

Notice of Agency Rule-making Proposal

AGENCY: Department of Professional and Financial Regulation, Office of Professional and Occupational Regulation, Real Estate Commission

CHAPTER NUMBER AND TITLE: Chapter 410, Minimum Standards of Practice

PROPOSED RULE NUMBER (*leave blank; assigned by Secretary of State*):

CONTACT PERSON FOR THIS FILING: Carol Leighton, Board Administrator, Office of Professional and Occupational Regulation, 35 State House Station, Augusta, ME 04333, tel. (207) 624-8520, email carol.j.leighton@maine.gov

CONTACT PERSON FOR SMALL BUSINESS INFORMATION (if different): Carol Leighton

PUBLIC HEARING (if any): August 15, 2013, 9:30 a.m., Department of Professional and Financial Regulation, 76 Northern Avenue, Gardiner, ME

COMMENT DEADLINE: August 26, 2013

BRIEF *SUMMARY: The proposed rule removes the requirement that real estate brokerage advertisements must contain the contact information for the agency. The proposed rule retains the requirement that real estate brokerage advertisements must contain the trade name of the agency, and further requires that “in an advertisement that appears on or is sent via the Internet, the trade name of the agency that placed the advertisement must prominently appear or be readily accessible.”

The proposed rule also builds upon an existing rule provision that regulates inducements such as free gifts or prize money offered by licensees. The proposed rule provides: “Any limitations or conditions of the offering must be prominently displayed or presented. In an offering that appears on or is sent via the Internet, any limitations or conditions of the offering must prominently appear in the offering itself, or in a page view or window that is directly and immediately accessible via a link in the offering. The link must be identified by words such as “limitations,” “conditions,” or “terms of offer” and must prominently appear in the offering.” The proposed rule is available at www.maine.gov/professionallicensing.

IMPACT ON MUNICIPALITIES OR COUNTIES (if any): None

STATUTORY AUTHORITY FOR THIS RULE: 32 MRSA §§13065(3), 13279, 13280

SUBSTANTIVE STATE OR FEDERAL LAW BEING IMPLEMENTED (if different):

E-MAIL FOR OVERALL AGENCY RULE-MAKING LIAISON: jeffrey.m.frankel@maine.gov

* Check one of the following two boxes.



The above summary is for use in both the newspaper and website notices.



The above summary is for the newspaper notice only. A more detailed summary / basis statement is attached.

Please approve bottom portion of this form and assign appropriate AdvantageME number.

APPROVED FOR PAYMENT _____ DATE: _____
(authorized signature)

FUND	AGENCY	ORG	APP	JOB	OBJT	AMOUNT
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Rule-Making Fact Sheet

(5 MRSA §8057-A)

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NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON: Carol Leighton, Board Administrator, 35 State House Station, Augusta, ME 04333, tel. (207) 624-8520, email carol.j.leighton@maine.gov

CHAPTER NUMBER AND RULE TITLE: Chapter 410, Minimum Standards of Practice

STATUTORY AUTHORITY: 32 MRSA §§13065(3), 13279, 13280

DATE AND PLACE OF PUBLIC HEARING: August 15, 2013, 9:30 a.m., Department of Professional and Financial Regulation, 76 Northern Avenue, Gardiner, ME

COMMENT DEADLINE: August 26, 2013

PRINCIPAL REASON OR PURPOSE FOR PROPOSING THIS RULE: To address issues surrounding real estate brokerage advertisements appearing on the Internet.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE (PRIMARY SOURCES): Regulation of unfair trade practices by the Federal Trade Commission and Federal Communications Commission, difficulty of achieving compliance with the current Real Estate Commission rule requiring display of brokerage contact information with respect to Internet advertisements, professional judgment.

ANALYSIS AND EXPECTED OPERATION OF THE RULE: The proposed rule removes the requirement that real estate brokerage advertisements must contain the contact information for the agency. The proposed rule retains the requirement that real estate brokerage advertisements must contain the trade name of the agency, and further requires that “in an advertisement that appears on or is sent via the Internet, the trade name of the agency that placed the advertisement must prominently appear or be readily accessible.”

The proposed rule also builds upon an existing rule provision that regulates inducements such as free gifts or prize money offered by licensees. The proposed rule provides: “Any limitations or conditions of the offering must be prominently displayed or presented. In an offering that appears on or is sent via the Internet, any limitations or conditions of the offering must prominently appear in the offering itself, or in a page view or window that is directly and immediately accessible via a link in the offering. The link must be identified by words such as “limitations,” “conditions,” or “terms of offer” and must prominently appear in the offering.”

FINDINGS UNDER CRITERIA CONTAINED IN EXECUTIVE ORDER 20 FY 11/12:

(A) The proposed rule will not negatively impact job growth or creation; (B) There are no fees included in the rule; (C) There is no cost to the public in terms of time and money required to comply with the rule. By eliminating the need to include contact information in advertisements,

the rule may reduce costs; (D) The Maine Unfair Trade Practices Act, 5 MRSA §205-A et seq., could potentially address the failure to display limitations or conditions to offerings of free gifts, prize money, etc., but doesn't contain the bright-line requirements of the proposed rule; (E) Policy guidelines of the Federal Trade Commission and Federal Communications Commission establish standards for the disclosure and display of limitations or conditions in advertisements, but not in the context of limitations and disclosures to offerings of free gifts, prize money, etc. by real estate licensees.

FISCAL IMPACT OF THE RULE: None

FOR RULES WITH FISCAL IMPACT OF \$1 MILLION OR MORE, ALSO INCLUDE:

ECONOMIC IMPACT, WHETHER OR NOT QUANTIFIABLE IN MONETARY TERMS:

INDIVIDUALS OR GROUPS AFFECTED AND HOW THEY WILL BE AFFECTED:

BENEFITS OF THE RULE:

Note: If necessary, additional pages may be used.

Economic Impact Statement

(5 MRSA §8052(5-A))

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CHAPTER NUMBER AND RULE TITLE: Chapter 410, Minimum Standards of Practice

TYPES AND NUMBER OF SMALL BUSINESS SUBJECT TO THE RULE: The Real Estate Commission licenses 4,755 brokers, associate brokers, designated brokers and sales agents and 992 real estate brokerage agencies (active licenses as of 3/1/13). Title 5 MRSA §8052(5-A) defines “small business” as businesses that have 20 or fewer employees. The board does not collect any information that permits it to reliably estimate how many of its licensees are small business as defined in 5 MRSA §8052(5-A).

PROJECTED REPORTING, RECORD-KEEPING AND OTHER ADMINISTRATIVE COSTS REQUIRED FOR COMPLIANCE WITH THE PROPOSED RULE, INCLUDING THE TYPE OF PROFESSIONAL SKILLS NECESSARY FOR PREPARATION OF THE REPORT OR RECORD: None

PROBABLE IMPACT ON AFFECTED SMALL BUSINESS: None

LESS INTRUSIVE OR LESS COSTLY, REASONABLE ALTERNATIVE METHODS OF ACHIEVING THE PURPOSES OF THE PROPOSED RULE: None

02 DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION**039 REAL ESTATE COMMISSION****Chapter 410: MINIMUM STANDARDS OF PRACTICE**

Summary: This chapter clarifies and establishes standards for practicing real estate brokerage.

1. Advertising**1. Definitions**

- A. Advertise. “Advertise,” “advertising” and “advertisement” include all forms of representation, promotion and solicitation disseminated in any manner and by any means of communication for any purpose related to real estate brokerage activity, including, at a minimum, advertising the sale or purchase of real estate or promotion of real estate brokerage services conducted by mail, telephone, the Internet (including but not limited to the world wide web, electronic mail and social media), ~~the World Wide Web, E-mail, electronic bulletin board or other similar electronic common carrier systems~~, business cards, signs, television, radio, magazines, newspapers, and telephonic greetings or answering machine messages.
- B. ~~Contact information. “Contact information” means information as to how the public can contact the real estate brokerage agency either by phone or in person at the agency’s place of business as licensed by the Commission.~~(Repealed)
- C. Prominent. “Prominent” means standing out so as to be seen easily; conspicuous; particularly noticeable.

2. (Repealed)**3. (Repealed)****4. (Repealed)****4-A. Advertising by Real Estate Brokerage Agencies**

Real estate brokerage advertisements must contain the trade name ~~and contact information as licensed by the Commission~~ of the real estate brokerage agency ~~as licensed by the Commission that placed the advertisement~~. The trade name ~~and contact information~~ of the agency must be prominently displayed or presented. In an advertisement that appears on or is sent via the Internet, the trade name of the agency that placed the advertisement must prominently appear or be readily accessible.

In addition, the designated broker may authorize an advertisement that includes the name, telephone number, slogan, logotype or photo of an affiliated licensee or group or team of affiliated licensees as part of the brokerage services being offered by the real estate

brokerage agency. The affiliated licensee or group or team of affiliated licensees may not independently engage in real estate brokerage.

5. Written Permission of Owner Required to Advertise

A real estate brokerage agency or its affiliated licensees shall not advertise any real estate for sale without first obtaining the written permission of the owner or the owner's authorized representative.

6. Advertising of Exclusive Listing Held by Another Agency

A real estate brokerage agency or its affiliated licensees shall not publish or cause to be published an advertisement that makes reference to the availability of real estate which is exclusively listed for sale by another real estate brokerage agency unless the licensee obtains the prior written consent of the designated broker who has been authorized by the owner to provide consent.

7. Deception and Misrepresentation Prohibited

Advertising must be free from deception and shall not misrepresent the condition of the real estate, terms of the sale or purchase, real estate brokerage agency policies, or real estate brokerage services.

2. Acting in Self-Interest

A licensee holding an active real estate license shall disclose, in the offer to purchase, that the licensee is a real estate licensee:

1. When buying real estate not listed with a real estate brokerage agency;
2. When buying real estate listed with the licensee's real estate brokerage agency; or
3. When buying real estate and sharing in the brokerage fee resulting from the sale of such real estate.

3. Market Value

1. When Opinion Permitted

A licensee may provide a free opinion of value to a buyer or seller when the licensee is soliciting the buyer or seller to provide brokerage services and before an agreement to provide any services has been reached or executed.

2. When Advice Prohibited

At any time after the solicitation to provide brokerage services, as described in Section 3(1) of this chapter, a transaction broker may not provide advice to either party regarding market value.

3. **Provision of Comparable Market Data**

A licensee who provides comparable market data to a buyer or seller for the buyer or seller to determine market value or list price is performing a ministerial act as defined in 32 MRSA §13271(9).

4. **Factors or Conditions That May Impact Client's Interest**

A licensee who represents a buyer or seller client shall advise the client of any factors or conditions actually known by the licensee, or if acting in a reasonable manner, should have been known by the licensee, that may materially impact the client's interest as it pertains to the market value of real estate.

4. **Net Listing Prohibited**

A net listing shall be prohibited. A net listing is a type of listing in which the real estate brokerage agency receives, as commission, all excess money over and above the minimum sale price set by the seller.

5. **Duty to Furnish Real Estate Brokerage-Related Documents**

A licensee shall furnish copies of brokerage agreements, offers, counteroffers, and all types of contracts to all parties at the time of their signatures. Upon obtaining a written acceptance of an offer or counteroffer to purchase real estate, a licensee shall, within a reasonable time, deliver true, legible copies of the purchase and sale contract, signed by the seller and buyer, to both seller and buyer.

6. **Disclosure of Real Estate Brokerage Agency Compensation Policy**

1. **Other Agencies**

Written brokerage agreements must include a statement disclosing the real estate brokerage agency's policy on cooperating with and compensating other real estate brokerage agencies in the sale or purchase of real estate. If the real estate brokerage agency's policy is not to compensate all other real estate brokerage agencies in the same manner, this policy must be included in the statement and include a notice to the buyer or seller that this policy may limit the participation of other real estate brokerage agencies in the marketplace.

2. **Affiliated Licensees**

When a real estate brokerage agency's policy on paying commissions to its affiliated licensees provides for an incentive to an affiliated licensee for a greater commission for an in-house sale versus transactions involving a cooperating real estate brokerage agency, this policy must be disclosed in a written brokerage agreement with a buyer or seller.

7. Disclosed Dual Agency

A real estate brokerage agency which has a written company policy that permits disclosed dual agency shall obtain the informed written consent, as set forth in 32 MRSA §13275, of the seller or buyer to the disclosed dual agency relationship at the time of entering into a written brokerage agreement that creates an agent-client relationship.

8. Appointed Agent Procedures and Disclosure

1. Designated Broker Responsibilities – Appointed Agent

- A. A designated broker appointing an affiliated licensee(s) to act as an agent of a client shall take ordinary and necessary care to protect confidential information disclosed by the client to the appointed agent.
- B. An appointed agent may disclose to the agency's designated broker, or a designee specified by the designated broker, confidential information of a client for the purpose of seeking advice or assistance for the benefit of the client in regard to a possible transaction. Confidential information shall be treated as such by the designated broker or other specified representative of the broker and shall not be disclosed unless otherwise required by 32 MRSA Chapter 114 or related rules or requested or permitted by the client who originally disclosed the confidential information.
- C. A designated broker who is appointed to act as the agent of the client must select a designee to fulfill the responsibilities as listed in Section 8(1)(B) of this chapter.

2. Appointed Agent – Disclosure

The appointed agent disclosure shall be provided to the client prior to entering into a written brokerage agreement and shall include, at a minimum, the following provisions:

- A. The name of the appointed agent and type of license held;
- B. A statement that the appointed agent will be the client's agent and will owe the client fiduciary duties which, among other things, include the obligation not to reveal confidential information obtained from the client to other licensees, except to the designated broker or the designated broker's designee, as listed in Section 8(1)(B) of this chapter, for the purpose of seeking advice or assistance for the benefit of the client;
- C. A statement that the real estate brokerage agency may be representing both the seller and the buyer in connection with the sale or purchase of real estate;
- D. A statement that other agents may be appointed during the term of the written brokerage agreement should the appointed agent not be able to fulfill the terms of the written brokerage agreement or as by agreement between the designated broker and client. At the appointment of new or additional agent(s), the designated broker must comply with the provisions of this Section, including but

not limited to, obtaining the client's signature consenting or not consenting to the appointment. An appointment of another agent as a new or additional agent does not relieve the first appointed agent of any of the fiduciary duties owed to the client; and

- E. A section for the client to consent or not consent, in writing, to the appointment.

9. Real Estate Brokerage Relationship Disclosure Procedures

1. Real Estate Brokerage Relationships Form

The Commission incorporates into this chapter by reference the Real Estate Brokerage Relationships Form attached to this chapter. (Maine Real Estate Commission Form #3 revised 07/06).

2. Obligation to Furnish Real Estate Brokerage Relationships Form

Except as provided in Section 9(3) of this chapter, a licensee shall furnish a prospective buyer or seller with a copy of the Real Estate Brokerage Relationships Form when there is substantive communication regarding a real estate transaction by either a face-to-face meeting, a written communication, or an electronic communication with the prospective buyer or seller.

3. Exceptions

A licensee is not required to provide a copy of the form to a prospective buyer or seller in the following instances:

- A. The real estate is land without a residential dwelling unit or is land with more than 4 residential dwelling units;
- B. The licensee is acting solely as a principal in a real estate transaction;
- C. The written communication from the licensee is a solicitation of business; or
- D. The licensee has knowledge, or may reasonably assume, that another licensee has given a copy of the form to a prospective buyer or seller in that transaction.

4. Completion of Real Estate Brokerage Relationships Form

The licensee shall complete the appropriate section of the form relating to the presentation of the form.

10. Solicitation of Written Brokerage Agreements

A licensee shall not solicit a written brokerage agreement from a seller or buyer if the licensee knows, or acting in a reasonable manner should have known, that the buyer or seller has contracted with another real estate brokerage agency for the same real estate brokerage services on an exclusive basis. This Section does not preclude a real estate brokerage agency from

entering into a written brokerage agreement with a seller or buyer, when the initial contact is initiated by the seller or buyer, provided that the written brokerage agreement does not become effective until the expiration or release of the previous written brokerage agreement.

11. Inducements

The offering of a free gift, prize, money or other valuable consideration by a real estate brokerage agency or affiliated licensee as an inducement shall be free from deception, and shall not serve to distort the true value of the real estate or the service being promoted. Any limitations or conditions of the offering must be prominently displayed or presented. In an offering that appears on or is sent via the Internet, any limitations or conditions of the offering must prominently appear in the offering itself, or in a page view or window that is directly and immediately accessible via a link in the offering. The link must be identified by words such as "limitations," "conditions," or "terms of offer" and must prominently appear in the offering.

12. Confidentiality of Offers and Purchase and Sale Contract Terms

During the pendency of the transaction, the real estate brokerage agency or affiliated licensee shall not disclose any terms of an offer, counteroffer or purchase and sale contract to anyone other than the buyer and seller without the prior written permission of the buyer and seller, except said documents shall be made available to the director of the Commission upon request.

13. Licensee's Duty

1. Keep the Designated Broker Informed

An affiliated licensee shall keep the designated broker fully informed of all activities conducted on behalf of the agency and shall notify the designated broker of any other activities that might impact on the responsibilities of the designated broker as required under Chapter 400, Section 1 of the Commission's rules.

2. Provide Documents to Designated Broker

An affiliated licensee must provide originals or true copies of all real estate brokerage documents and records prepared in a real estate transaction as listed in Chapter 400, Section 3 of the Commission's rules to the designated broker within 5 calendar days after execution of the document or record.

3. Domain Names and Web Sites

An affiliated licensee may not directly or indirectly, through himself or others -

- register a domain name for a web site, or
- develop or upload to the internet a web site,

that promotes real estate brokerage services or the sale or purchase of real estate through the agency with whom the licensee is affiliated without the consent of the designated broker.

Any web site developed or uploaded under this Section must comply with the advertising requirements contained in Chapter 410, Section 1.

14. Licensee's Duty to Obtain and Provide Disclosure Information on Private Water Supply, Heating, Waste Disposal System and Known Hazardous Materials

1. Listing Licensee

A listing licensee shall be responsible for obtaining information necessary to make disclosures, as set forth in Sections 15 to 18 of this chapter, to buyers and shall make a reasonable effort to assure that the information is conveyed to a selling licensee.

2. Selling Licensee

A selling licensee shall be responsible for obtaining from the listing licensee the information necessary for making disclosures, as set forth in Sections 15 to 18 of this chapter, and for assuring that the disclosures are made to buyers.

3. Unlisted Property

A licensee shall be responsible for obtaining from the seller in a real estate brokerage transaction where the property is not listed with a real estate brokerage agency, the information necessary for making disclosures, as set forth in Sections 15 to 18 of this chapter, and for assuring that the disclosures are made to the buyer.

15. Private Water Supply Disclosure

A licensee listing a single-family residential property, a multifamily property, a residential lot or a commercial property with a residential component served by a private water supply, and a licensee in such transactions when the property is not listed with a real estate brokerage agency, shall ask the seller for the following information:

1. Type of system;
2. Location;
3. Malfunctions;
4. Date of installation;
5. Date of most recent water test; and
6. Whether or not the seller has experienced a problem such as an unsatisfactory water test or a water test with notations.

Such information and any other information pertinent to the private water supply shall be conveyed, in writing, to a buyer prior to or during preparation of an offer. The fact that information regarding the private water supply is not available shall also be conveyed, in writing, when such is the case.

16. Heating Disclosure

A licensee listing a single-family residential property, a multifamily property or a commercial property with a residential component, and a licensee in such transactions when the property is not listed with a real estate brokerage agency, shall ask the seller for the following information regarding the heating system(s) and/or source(s):

1. Type(s);
2. Age of system/source(s);
3. Name of company who services system/source(s);
4. Date of most recent service call;
5. Annual consumption per system/source (i.e. gallons, kilowatt hours, cords);
6. Malfunctions per system/source within the past 2 years.

Such information and any other information pertinent to the heating system(s) and/or source(s) shall be conveyed, in writing, to a buyer prior to or during the preparation of an offer. The fact that information pertinent to the heating system(s) and/or source(s) is not available shall be conveyed, in writing, when such is the case.

17. Waste Disposal System Disclosure

1. Private Waste Disposal System

A licensee listing a single-family residential property, a multifamily property, a residential lot or a commercial property with a residential component served by a private waste disposal system, and a licensee in such transactions when the property is not listed with a real estate brokerage agency, shall ask the seller for the following information:

- A. Type of system;
- B. Size of tank;
- C. Type of tank;
- D. Location of tank;
- E. Malfunctions of tank;
- F. Date of installation of tank;

- G. Location of leach field;
- H. Malfunctions of leach field;
- I. Date of installation of leach field;
- J. Date of most recent servicing of system; and
- K. Name of the contractor who services the system.

Such information and any other information pertinent to the waste disposal system shall be conveyed, in writing, to a buyer prior to or during preparation of an offer. The fact that information regarding the waste disposal system is not available shall also be conveyed, in writing, when such is the case.

2. Municipal or Quasi-Public Waste Disposal System

A licensee listing a single-family residential property, a multifamily property, a residential lot or a commercial property with a residential component served by a municipal or quasi-public waste disposal system, and a licensee in such transactions when the property is not listed with a real estate brokerage agency, shall ask the seller if the seller has experienced any system or line malfunction. This information shall be conveyed, in writing, to a buyer prior to or during the preparation of an offer.

18. Known Hazardous Materials Disclosure

1. Duty to Keep Informed

A licensee shall keep informed of any federal, state or local laws, rules, regulations or ordinances concerning known hazardous materials that may impact negatively upon the health and well being of buyers and sellers.

2. Duty to Disclose

A listing licensee, and a licensee in transactions when the property is not listed with a real estate brokerage agency, shall disclose, in writing, whether the seller makes any representations regarding current or previously existing known hazardous materials on or in the real estate. In addition, the licensee shall give a written statement to the buyer encouraging the buyer to seek information from professionals regarding any specific hazardous material issue or concern. Such written representation and statement shall be conveyed to a buyer prior to or during the preparation of an offer.

3. Request for Information from Seller

A licensee listing a single-family residential property, a multifamily property, a commercial property with a residential component and a licensee in such transactions when the property is not listed with a real estate brokerage agency, shall ask the seller whether the seller has any knowledge of current or previously existing asbestos, radon, lead based paint, and underground storage tanks. Such information and any other

information pertinent to hazardous materials shall be conveyed, in writing, to a buyer prior to or during preparation of an offer. The fact that information regarding hazardous materials is not available shall also be conveyed, in writing, when such is the case.

19. Referral Fees

1. Certain Referral Fees Prohibited

A licensee may not receive compensation or other valuable consideration from a title company, lender or closing company or any affiliated employee for directing a buyer or seller in a real estate transaction to a company or an individual for financing, title or closing services.

2. Disclosure of Certain Referral Fees Required

A licensee who anticipates receiving compensation or other valuable consideration from a company or person for a referral of services, other than the services listed in Section 19(1) of this chapter or real estate brokerage services, to a buyer or seller during a real estate brokerage transaction may not accept such compensation or valuable consideration unless the licensee discloses in writing to the person paying for such service, and to the client if not the same person, that the licensee anticipates receiving such compensation or other valuable compensation for such referral.

[APA Office Note: the Real Estate Brokerage Relationships Form is a separate file in Adobe .pdf format.]

STATUTORY AUTHORITY: 32 MRSA §§ 13065(3), 13279, 13280

EFFECTIVE DATE: